



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MPA/146480

PRELIMINARY RECITALS

Pursuant to a petition filed January 10, 2013, under Wis. Stat. §49.45(5), and Wis. Admin. Code §HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability (DHCAA) now known as the Office of Inspector General (OIG) in regard to Medical Assistance (MA), a telephonic hearing was held on March 5, 2013, at Kenosha, Wisconsin.

The issue for determination is whether petitioner is eligible for payment by the MA program for Speech Language Therapy (SLT) services as requested in a prior authorization (PA) request.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By written submittal: Theresa Walske, MS, CCC-SLP
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Kenosha County and is eligible for MA.
2. Petitioner is 3 years old and is diagnosed with Autism and speech and language delays.
3. On December 3, 2012 the petitioner's private SLT submitted a PA request to the DHCAA. The request was made for 26 sessions of SLT beginning November 19, 2012 (PA# [REDACTED]). The Plan of Care (POC) for the requested PA lists the following short term goals:
 1. Will imitate simple directions without objects (i.e., blow a kiss, stomp your feet, wave your hand, clap your hands, etc.) with 80% accuracy.
 2. Will imitate simple directions with objects (i.e., hit the drum, talk on the phone, throw the ball, etc.) with 80% accuracy.
 3. Imitate a one-word utterance or approximation 10-20 or more times in a 45 minute session with 80% accuracy.
 4. Independently use a one-word utterance or approximation 5-10 times in a 45 minute session with 80% accuracy.
 5. Will identify common objects (i.e., cup, book, baby, brush, bowl, spoon) with 80% accuracy.
4. On December 19, 2012 the DHCAA issued a notice to petitioner denying the PA request because it concluded that the SLT regimen requested was not medically necessary under Wisconsin's MA rules.
5. In July 2012 an Individualized Education Plan (IEP) was developed for petitioner through the Kenosha Unified School District. See Exhibit G. In September 2012 that IEP was revised. See Exhibit H. The IEP was revised because it was determined that petitioner would be better served through itinerant early childhood programming in her home 3 times per week for 30 minutes each, as opposed to placement in an early childhood special education classroom. The itinerant work was to be provided from September 17, 2012 through January 31, 2012. The classroom placement was rejected because petitioner "demonstrates sensory processing deficits that significantly impact her ability [to] function in a preschool classroom environment. [Petitioner's] sensory issues and developmental delays will be best addressed through a high level of itinerant support that will provide a successful transition to an Early Childhood classroom setting." Exhibit H, p. 16.
6. The itinerant teacher worked with petitioner from September 17, 2012 through January 23, 2013. The goals in the itinerant teacher's Progress Report dated November 12, 2012 show that she worked on the following with petitioner:
 1. [Petitioner] will give and take a toy/material from a peer/adult on request for 2 exchanges 3 out of 5 times.
 2. [Petitioner] will demonstrate an understanding of "wait" and "first/then" either verbally or through pictures, by transitioning between activities without noticeable upset 3 out of 5 times.
 3. [Petitioner] will follow group music/movement/routine activities by imitating and anticipating what comes next 3 out of 4 times.
 4. [Petitioner] will explore a variety of toys/textures/school materials, varying the way she uses them to fit the occasion/function, without noticeable upset in 3/5 opportunities.
 5. [Petitioner] will increase her use of words/functional phrases for a variety of language functions (commenting, labeling, requesting, greeting, etc.) in 4/5 structured opportunities.
 6. [Petitioner] will increase her ability to respond to a variety of simple questions in 3/5 structured opportunities.

DISCUSSION

Speech and language therapy is an MA-covered service, subject to prior authorization after the first 35 treatment days. Wis. Admin. Code, §DHS 107.18(2). In determining whether to approve such a therapy request, the DHCAA employs the generic prior authorization criteria found at §DHS 107.02(3)(e). Those criteria include the requirements that a service be medically necessary, appropriate, and an effective use of available services.

“Medically necessary” means a medical assistance service under Chapter DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider and the setting in which the service is provided;
 3. Is appropriate with regard to generally accepted standards of medical practice;
 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
 5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
 6. Is not duplicative with respect to other services being provided to the recipient;
 7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
 9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code §DHS 101.03(96m).

It is the provider’s duty to justify the provision of the services when requesting the PA. The DHCAA denied the PA here because it found a lack of justification to support *private* SLT services under Wis. Adm. Code §§DHS 107.02(3)(d)6 and 9 due to the fact that she receives SLT services through the school district.

The Department has ruled on when therapy from one provider duplicates that from another. Deputy Secretary Susan Reinardy held in *DHA Final Decision No. MPA-37/80183*, a speech therapy appeal, that “the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists.” *Id.* at 2. It does not matter if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates “an existing service if the intended outcome of the two services is substantially the same.” *Id.* at 3. That Final Decision specifically rejected additional therapy because the

recipient “needs more intense services than the school provides.” The holding rests on the principle that “Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address.” *Id.* at 4. The Deputy Secretary has made it clear that the “intended outcome” test must be read broadly. In *DHA Final Decision No MPA-49/82886*, a decision reiterating the principle laid down in *MPA-37/80183*, she pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills. The unstated rationale underlying the Deputy Secretary’s decision, at least as it pertains to private therapy that duplicates school therapy, is that federal law requires school districts to meet the special needs of its students and the Department will not allow a school district’s failure to comply with this obligation to provide the reason for funding another source of therapy. The Deputy Secretary’s Final Decisions are binding on administrative law judges, meaning that they must follow those decisions.

The petitioner’s mother, who is an excellent advocate for her daughter, explained how the itinerant teacher was not only working on SLT, but on sensory issues and developmental delays in order to help petitioner transition to the classroom setting. She argued that these ‘transitioning’ goals are ‘social/emotional’ goals, and not to be confused as SLT. See also Exhibits D and E. She also argued that she is aware of another child who was receiving SLT in the school and MA was paying the private SLT. See also Exhibit F. As to that latter issue, I cannot begin to know why MA would pay for the SLT if it were duplicitous, or if the approval was made in error, and it is in no way binding on my decision here in any event. As to the goals being treated as social versus SLT, the question is: are these regimens in essence duplicative in addressing the child’s condition? I can only conclude based on the language of the goals that they are. Both the school and the private provider are providing SLT services that are designed to improve petitioner’s functional communication and receptive and expressive communications.

Based on this, there is not enough to establish the medical necessity of the sought additional private SLT regimen under these Final Decisions. The assertions that group treatment is insufficient versus 1:1 SLT treatment; or that the private regimen is necessary for functional improvement in the home and community versus in the educational setting; or that a particular diagnosis requires more, are without merit in this analysis. I certainly understand that her parents want the best for petitioner, and that more SLT may be better, however, that is not the criterion on which I must make this decision. I find that the petitioner has not established by clinical documentation the medical necessity of the additional private therapy as that term is used by the MA Program, and the Department’s denial must be affirmed. Nothing in this Decision prevents the petitioner and her private provider from submitting a new PA Request for a new SLT regimen that better documents the medical necessity of the sought private regimen.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division’s hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

Petitioner is not eligible for payment by the MA program for the SLT services requested in the PA request because it would duplicate the SLT services she receives through her school district.

THEREFORE, it is

ORDERED

The petition for review herein is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

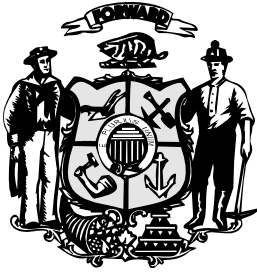
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 26th day of March, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on March 26, 2013.

Division of Health Care Access And Accountability